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CONSTITUTIONALITY OF MECHANICS' LIEN LAWS. — The statutes creating liens in favor of sub-contractors and material men are of two types. The first type gives an indirect lien, which depends upon, and is limited in amount to, the indebtedness of the owner to the contractor. The sub-contractor is subrogated to the rights of the original contractor, and the lien is a remedy for the enforcement of a debt.[1] The second type gives a lien directly to the sub-contractors and material men regardless of the state of accounts between the original parties, and it is to this type of statute that the most determined constitutional objections have been directed. It is well settled that such enactments do not impair the obligation of contract, as they do not apply to contracts already existing;[2] nor are they invalid as class legislation.[3] The chief argument has been under the due process and similar clauses of the federal and state constitutions.

It is settled by the weight of authority that the ordinary statute, which gives a lien to sub-contractors for the value of their wares does not offend against the due process clause,[4] even though the act be construed to allow liens which aggregate more in value than the contract

[1] See 2 JONES, LIENS, § 1286.

[2] Colpetzer *v.* Trinity Church, 24 Neb. 113, 37 N. W. 931.

[3] Warren *v.* Sohn, 112 Ind. 213, 13 N. E. 863.

[4] Smalley *v.* Gearing, 121 Mich. 190, 79 N. W. 1114; Laird *v.* Moonan, 32 Minn. 358, 20 N. W. 354; Mallory *v.* La Crosse Abattoir Co., 80 Wis. 170, 49 N. W. 1071. In the Wisconsin case the court appears to have regarded as of importance a proviso in the statute allowing the owner to recover from the contractor any sums expended in discharging liens. But he may do so without any statute on the ordinary principles of subrogation. Nichols *v.* Bucknam, 117 Mass. 488.

price.[5] The reasoning by which this result is reached is, that the owner knows that the work and materials will be furnished by persons who must give the contractor credit; and he is held to have knowledge of the statute and to contract with reference thereto. Hence it is by his own will that any incumbrance exists.[6] He is not compelled to pay twice, or for something he did not order, as he may defer payment till the time for filing liens has expired.[7] Clearly there results a slight restriction on the liberty of contract, but judicial opinion is almost unanimous that this restriction is amply justified by the promotion of the public welfare. The unpaid sub-contractor is furnished a trustworthy security when he can rely for payment on the property whose value has been enhanced by his work and materials.[8] As a further argument in favor of such statutes, it may be suggested that the creation of a direct lien in favor of a stranger and without consent of the owner is a conception by no means novel in our law.[9]

This reasoning sanctions the creation of a legal, but non-contractual, relation between the owner and sub-contractors, and gives the latter an independent right based solely on the statute.[10] In accordance with this view, it is held by the weight of authority that a stipulation in the original contract between the owner and builder cannot deprive the sub-contractors of their lien.[11] The contrary doctrine, which is upheld in Pennsylvania, proceeds on the theory that the statute makes the contractor the agent of the owner to create a contractual relation between him and the sub-contractors, the original contract being, so to speak, the power of attorney for that purpose.[12] But it is submitted

[5] Henry & Coatsworth Co. *v.* Evans, 97 Mo. 47, 10 S. W. 868; Bardwell *v.* Mann, 46 Minn. 285, 48 N. W. 1120. But see Whittier & Fuller *v.* Wilbur, 48 Cal. 175.

[6] Jones *v.* Great Southern Fireproof Hotel Co., 86 Fed. 370; Blauvelt *v.* Woodworth, 31 N. Y. 285; Chicago Lumber Co. *v.* Newcomb, 19 Colo. App. 265, 74 Pac. 786. "The foundation principle on which these statutes have been upheld in this and other jurisdictions is the consent and authority of the owner to charge his property, evidenced by his own contract made under and with reference to the provisions of the existing lien law." Bardwell *v.* Mann, 46 Minn. 285, 289, 48 N. W. 1120, 1122.

[7] Smith *v.* Newbaur, 144 Ind. 95, 42 N. E. 40; Henry & Coatsworth Co. *v.* Evans, *supra.*

[8] Cole Mfg. Co. *v.* Falls, 90 Tenn. 466, 16 S.W. 1045; Jones *v.* Great Southern Fireproof Hotel Co., *supra.* "It does not take away or affect the rights of the owner any further than it may be necessary for the security of those who are presumed to have added something to the owner's property equal to the expense incurred." Laird *v.* Moonan, 32 Minn. 358, 361, 20 N. W. 354, 355. *Contra,* Palmer & Crawford *v.* Tingle, 55 Oh. St. 423, 45 N. E. 313. The statute considered in this case was the same as that which was subsequently held constitutional in the federal case *supra.*

[9] The Bee, 3 Fed. Cas. No. 1,219 (salvage lien); Bright *v.* Boyd, 4 Fed. Cas. No. 1,875 (lien on land for improvements made by *bonâ fide* trespasser); Singer Mfg. Co. *v.* London & S. W. Ry. Co., 1 Q. B. D. 833 (lien of carrier for goods shipped by a thief).

[10] "The lien law of 1881 created a new relation between builders on the one hand, and mechanics, laborers, and material men, contributing skill, labor, and material to their building, on the other. But it is a relationship of law, not of contract." Colpetzer *v.* Trinity Church, 24 Neb. 113, 124, 37 N. W. 931, 936.

[11] Whittier & Fuller *v.* Wilbur, *supra*; Norton *v.* Clark, 85 Me. 357, 27 Atl. 252; Stewart Contracting Co. *v.* Trenton & New Brunswick R. Co., 71 N. J. L. 568, 60 Atl. 405. See 19 Am. St. Rep. 699, note.

[12] Schroeder *v.* Galland, 134 Pa. St. 277, 19 Atl. 632. A recent statute of Pennsylvania provides that "if the legal effect of the contract between the owner and contractor is, that no claim shall be filed by anyone, such provision shall be binding." 1903 PA.

that this is not a sound interpretation of the statute. It amounts to this, that the statute compels the owner to assent to the creation of a lien, but that he may choose not to assent, and thus evade the statute by so stipulating in the original contract.

If the prevailing doctrine is sound, it would seem to follow that there could be no constitutional objection to a statute which provides in terms, that there shall be a lien in favor of sub-contractors, notwithstanding the original contract stipulate that no liens shall be filed.[13] Yet in a recent case, the Supreme Court of Illinois declared such an act unconstitutional, as depriving the owner of his property, namely, liberty of contract, without due process of law.[14] *Kelly* v. *Johnson*, 44 Chic. Leg. News 89 (Ill., Sup. Ct.).

DISCRIMINATION INVOLVED IN PREFERENTIAL RAILROAD RATES FOR SUBURBAN SERVICE. — A recent case raises the question of how far suburban railroad rates may be based upon considerations different from those applying to other traffic. As a railway company, by its other traffic, could still earn a profit of seven per cent on its total capitalization, through an advance in rates, it was held proper for the railroad commission to prohibit the advance within a ten-mile suburban zone and to restore therein previous rates so low that they barely covered the actual cost of the service. *Puget Sound Electric Ry.* v. *Railroad Commission*, 117 Pac. 739 (Wash.). That a large population had grown up, induced by and dependent upon rates unreasonably low would itself be no objection to an advance to reasonable rates.[1] But the court held the advanced rates to be unreasonable on the ground that the others were the only rates that those travelling daily to work in the city could afford to pay.[2] The public, however, should go without a particular service of which it cannot afford to pay the reasonable cost, which must always include a fair return upon the reasonable capitalization of the

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LAWS, 279, PURD. DIG., 13 ed., 2489. Glassport Lumber Co. *v.* Wolf, 213 Pa. St. 407, 62 Atl. 1074.

[13] *Contra*, Waters *v.* Wolf, 162 Pa. St. 153, 29 Atl. 646.

[14] The court relied to some extent on a decision of the Supreme Court of Michigan. The John Spry Lumber Co. *v.* Sault Savings Bank, Loan & Trust Co., 77 Mich. 199, 43 N. W. 778. But the statute considered in that case provided for a lien without any reference whatever to the original contract, and has been distinguished in a later Michigan case. Smalley *v.* Gearing, *supra*. It is well settled that the owner should not be burdened with a lien for materials and labor not contemplated by the original contract. Siebrecht *v.* Hogan, 99 Wis. 437, 75 N. W. 71; Selma Sash, Door & Blind Factory *v.* Stoddard, 116 Ala. 251, 22 So. 555.

[1] Southern Pacific Co. *v.* Interstate Commerce Commission, 219 U. S. 433, 31 Sup. Ct. 288. See 24 HARV. L. REV. 581.

[2] Puget Sound Electric Ry. *v.* Railroad Commission, *supra*, 744, 745. See Brunswick Water District *v.* Maine Water Co., 99 Me. 371, 59 Atl. 537. The court cites this case for the proposition that if rates cannot be reasonable to both company and customer they must be to the latter. But this doctrine is properly restricted to the peculiar circumstances attending the initial operation of public service through sparsely settled regions. Coal & Coke Ry. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613. See Southern Pacific Ry. Co. *v.* Bartine, 170 Fed. 725, 767.